IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 1038 of 2007

WITH

SPECIAL CRIMINAL APPLICATION No. 1041 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M.S.SHAH

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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RAJNISHKUMAR TULI PROPRIETOR & 1 - Petitioners

Versus

STATE OF GUJARAT & 1 - Respondents

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Appearance :
MR SV RAJU WITH MR CHETAN K PANDYA for Petitioners.
MR SUNIT SHAH, PUBLIC PROSECUTOR for Respondent No. 1.
MR HARIN P RAVAL, ASSISTANT SOLICITOR GENERAL for Respondent No. 2.

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CORAM : HONOURABLE MR.JUSTICE M.S.SHAH

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 31/07/2007
COMMON ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE K.A.PUJ)

1. Since common issues of facts and law are involved in both these petitions and since both the petitions are heard together, the same are being disposed of by this common judgment and order.

2. Special Criminal Application No. 1038 of 2007 is filed by Rajnishkumar Tuli, proprietor of M/s. Sumit Wool Processors and Special Criminal Application No. 1041 of 2007 is filed by Ruchit Tuli, proprietor of M/s. R. S. Enterprises praying for quashing and setting aside Criminal Case Nos. 2 & 1 of 2007 respectively pending before the learned Additional Chief Metropolitan Magistrate's Court at Ahmedabad (for short 'Metropolitan Magistrate'). Both the petitioners have also prayed for issuance of writ of mandamus and/or certiorari and/or any other writ, order or direction quashing and setting aside the orders dated 23.04.2007 and 14.05.2007 passed by the learned Metropolitan Magistrate in Criminal Case Nos. 2 & 1 of 2007. In pursuance of an amendment granted by this Court on 01.06.2007, the petitioners have also made

additional prayer for issuance of writ of mandamus and/or writ of prohibition and/or any other appropriate writ, order or direction declaring Section 108 of the Customs Act, 1962 ultra vires to Article 14 of the Constitution of India to the extent that it requires person residing far away to attend to a summons to give evidence or to produce documents, issued under Section 108 of the Customs Act, 1962.

3. It is the case of the petitioners that they had done business with M/s. Krishna Trading Company, M/s. Nirmal Polyester Pvt. Ltd., M/s. Meenu Exim Pvt. Ltd. and M/s. Pradeep Kumar Nirmal Kumar on High Seas sale basis. The petitioners had received full payment of all the goods sold on High Seas sale basis. It is also their case that once the goods are sold to the Indian buyer, it is the duty of the buyer to comply with the custom provisions and to pay the custom duty and/or to fulfill the terms and conditions under which the goods are being imported. The petitioners had nothing to do once the goods are sold on High Seas. It is also their case that the respondent No. 2 had initiated inquiry against M/s. Krishna Trading, M/s. Nirmal Polyester Pvt. Ltd., M/s. Meenu Exim Private Ltd. and M/s. Pradeep Kumar Nirmal Kumar inter alia alleging that they have diversed the duty free Polyester Yarn imported against advance licenses. The petitioners were called for recording evidence by issuing summons under

Section 108 of the Customs Act, 1962 in connection with inquiry initiated by the respondent No. 2. The petitioners gave reply to the respondent No. 2 that because of high blood pressure and high sugar, the petitioners were unable to travel to Ahmedabad. However, they have shown their willingness to appear before the authority at Ludhiana DIR office. The petitioners also made available all the documents and accounts to the respondent authority and they have also shown their willingness to provide other documents that may be called for.

4. Despite these facts, The respondent No. 2 filed Criminal Case Nos. 2 & 1 of 2007 against the petitioners before the learned Metropolitan Magistrate at Ahmedabad under Sections 174 & 175 of the Indian Penal Code, 1860 read with Section 108 of the Customs Act, 1962 on 22.12.2006. The learned Metropolitan Magistrate has issued summons in respect of offences punishable under Sections 174 & 175 of the IPC making it returnable on 25.01.2007. The respondent No. 2 preferred an application Exh. 6 to issue arrest warrant against the petitioners and the same was issued by the learned Metropolitan Magistrate on 23.04.2007. The petitioners' advocate who was appearing before the learned Metropolitan Magistrate preferred an application Exh.7 to stay the arrest warrant. However, the said application was

rejected by the learned Metropolitan Magistrate on 14.05.2007.

5. Being aggrieved and dissatisfied by filing of Criminal Case Nos. 2 & 1 of 2007 and issuance of process by the learned Metropolitan Magistrate under Section 202 of Cr.P.C. in relation to offences punishable under Sections 174 & 175 of the IPC and the orders passed by the learned Metropolitan Magistrate below Exh. 6 & 7 on 23.04.2007 and 14.05.2007, the petitioners have preferred these petitions under Articles 14, 21, 226 & 227 of the Constitution of India and under Section 482 of the Code of Criminal Procedure, inter alia praying to quash and set aside Criminal Case Nos. 2 & 1 of 2007 and challenging the orders passed therein.

6. Mr. S. V. Raju, learned advocate appearing with Mr. Chetan K. Pandya for the petitioners has submitted that even if the allegations mentioned in the Criminal Cases are accepted to be true in their entirety, without admitting the same to be true, then also prima facie no offence, much less an offence punishable under Sections 174 & 175 of IPC is made out against the petitioners. On plain reading of the criminal case Nos. 2 & 1 of 2007, it is manifest that none of the ingredients of Sections 174 & 175 of the IPC are satisfied and therefore, no prima facie case is made out against the petitioners. The learned Metropolitan Magistrate has not followed the

mandatory requirement of Section 202 of the Criminal Procedure Code when the accused is residing at a place beyond the area in which he exercises his jurisdiction. It is mandatory requirement under Section 202 to postpone the issue of process against the accused where the accused is residing at a place beyond the area in which he exercises his jurisdiction and in such a case, the Magistrate has either to inquire into the case himself or direct an investigation to be made by a police officer. Neither of these things has been done by the learned Metropolitan Magistrate and straightway process was issued against the petitioners despite the fact that the petitioners were residing at a place beyond the area in which he exercises his jurisdiction. He has further submitted that both the criminal cases were filed by the respondent No.2 with malafide intention and they were maliciously instituted with an ulterior motive for twisting arm and threatening the petitioners with arrest and harassment.

7. Mr. Raju further submitted that Section 108 of the Customs Act, 1962 violates fundamental rights of the petitioners as the Gazetted Officer of Customs has uncontrolled power to summon any person either to give evidence or to produce documents even when such person is not residing in his local jurisdiction. Section 108 of the Customs Act violates the constitutional protection under Article 20 (3) of the

Constitution of India and it is contrary to the law laid down by the Hon'ble Supreme Court in the case of **Nandini Satpathy V/s. P. L. Dani reported in (1978) 2 SCC 424**. Section 108 of the Customs Act, treats unequals as equals and, therefore, equal treatment to unequals violates Article 14 of the Constitution of India as the persons residing or doing business beyond his jurisdiction are treated with those who are residing and/or doing business within the local jurisdiction of the Gazetted Officer of Customs. Under the Customs Act, there is no provision to reimburse the expenses of the person who is called to give evidence and/or to produce documents whereas the Gazetted Officer of Customs Act can get reimbursement of his expenses for travelling beyond his jurisdiction by way of travelling allowances and daily allowances over and above his salary. Though Code of Criminal Procedure 1973 under Section 160 (1) empowers any Police Officer making an investigation, by order in writing to require the attendance before himself of any person being within the limits of his own or any adjoining station and under Sub-section (2) the police officer can provide reasonable expenses for attending under sub-section (1) at any place other than his residence, no such provision is found under Section 108 of the Customs Act and, therefore, it violates fundamental rights of the petitioners. He has further submitted that even the summons issued to the petitioners to

give evidence and/or to produce documents did not say that the inquiry initiated against the High Seas Sale purchase is for smuggling of goods. On the contrary, the petitioners registered all the goods with import department as the petitioners sold the goods in High Seas sale. The petitioners have nothing to do with the diversion of imported Polyester Yarn as the petitioners had sold goods on High Seas sale. Once the goods are sold on High Seas Sale, the petitioners had nothing to do with those goods. It is the duty of the High Seas Sale purchaser to observe the terms and conditions of the advance license and/or to make the payment of the Custom duties as the buyer becomes real importer. He has further submitted that there was no intention on the part of the petitioners to disobey the summonses or to avoid the summonses issued by the respondent No. 2. However, because of the circumstances beyond their control, the petitioners could not travel to Ahmedabad and made available all the documents to the respondent No. 2 and had shown their willingness to appear before the DRI Office at Ludhiana and to give evidence. The petitioners are apprehending that the respondent No. 2 shall harass the petitioners and shall compel them to sign the statements that may be prepared by them against the will and wishes of the petitioners.

8. Mr. Raju has further submitted that the offence under

Sections 174 & 175 of the IPC is a bailable one, since the same is punishable with imprisonment for a maximum period of one month. The learned Metropolitan Magistrate has issued an arrest warrant without a preceding bailable warrant though the offence alleged is bailable. It is not in accordance with the scheme of the Criminal Procedure Code and hence, illegal. Mr. Raju has, therefore, submitted that while exercising the power conferred under Section 87 of the Code of Criminal Procedure and issuing a warrant, in a case of bailable offence, the Magistrate shall always issue at the first instance a bailable warrant. If the person does not appear before the Court even after execution of bailable warrant, only then the Magistrate may issue a non-bailable warrant. He has further submitted that the power under Section 71 of the Code of Criminal Procedure may be exercised by the Magistrate as well as by the Police Officers concerned and thereby indicating that the execution of the non-bailable warrant by arresting the concerned persons is not necessary. Mr. Raju has, therefore, submitted that both the criminal cases filed by the petitioners as well as the orders passed therein are required to be quashed and set aside and it is also to be held by this Court that the provisions contained in Section 108 of the Customs Act are ultravires Article 14 of the Constitution of India.

9. Mr. Raju, in support of his submission that provisions contained in Section 108 are cumbersome and cause tremendous hardships to the persons against whom such notices are issued, has relied on the decision of the Punjab & Haryana High Court in the case of **Tar Balbir Singh V/s. Union of India and another, 1992 (3) RECENT CRIMINAL REPORTS 210** wherein after observing that a citizen would only be put to harassment if he is being summoned to far off places, just to meet the whims of the officers of the DRI, the Court directed that the petitioner in that case shall be examined at Jalandhar on a date to be fixed by the Investigating Officer, by giving an advance notice of 15 days.

10. As far as issue of non-bailable warrant is concerned, Mr. Raju has relied on the decision of this Court in the case of **Dipak Navnitlal Parikh and others V/s. The State of Gujarat and Another, 1995 (1) G.L.H. (U.J.) 25** wherein the Court held that upon a joint reading of the provisions contained under Section 204 and Section 87 of the Code, it becomes abundantly clear that in any case in which the Court is empowered under the Code to issue a summons for the appearance of any person, the warrant may be issued by the Court instead of a summons, if the Court sees reason to believe that such a person has absconded or will not obey the

summons.

11. Mr. Raju has further relied on the decision of the Delhi High Court in the case of **G. Sagar Suri V/s. State and another, 2004 CRI. L. J. 212** wherein it is held that bare perusal of relevant sanctions shows that to cause appearance through warrant of arrest it is mandatory for the Court to record reasons in writing and it is only in following two eventualities that such a step is resorted to. Firstly, the Court should see reasons to believe that the said person has absconded or will not obey the summons. Secondly, if such a person has failed to appear despite due service of summons upon him. Thus there is no scope of doubt as to the nature of process to be issued in a summons case. It was mandatory for the Metropolitan Magistrate to issue at the first instance process of summons for the attendance of the petitioner. In case he had failed to appear despite due service of summons upon him, the Magistrate could have resorted to coercive process of warrants of arrest and that too after recording the reasons in writing.

12. Based on the aforesaid judgments, Mr. Raju has submitted that though pursuant to the summons issued, the petitioners' advocate did appear and only on one occasion, he could not remain present, non-bailable warrant was issued and that too without recording any valid reasons. He has, therefore,

submitted that the orders passed by the learned Metropolitan Magistrate in the form of issuance of non-bailable warrant deserve to be quashed and set aside and since there is no prima facie case against the petitioners, both the criminal cases are also required to be quashed and set aside.

13. Mr. Sunit Shah, learned Public Prosecutor appears for State of Gujarat whereas Mr. Harin P. Raval, learned Assistant Solicitor General appears for respondent No. 2 – Deputy Director in the office of Directorate of Revenue Intelligence, Ahmedabad. An affidavit-in-reply is filed by Mr. S. R. Prasad, Additional Director on behalf of respondent No. 2 and along with the said reply, several documents are placed on record. A rejoinder to this reply is also filed by the petitioners. Mr. Raval has made detailed submissions opposing the admission of the petitions and Mr. Shah has adopted the arguments made by Mr. Raval.

14. Mr. Raval has raised certain preliminary objections as regards the maintainability of the petitions. He has submitted that the petitions were filed in May 2007 styled as Special Criminal Applications invoking the jurisdiction of this Court under Articles 226 & 227 of the Constitution of India and Section 482 of the Code of Criminal Procedure. Thereafter on 01.06.2007, the petitioners have sought to introduce the prayer clause by virtue of para 14 (aa) praying

for issuance of a writ of mandamus or any other writ, order or direction declaring Section 108 of the Customs Act, 1962 ultravires Article 14 of the Constitution of India to the extent that it requires person residing far away to attend to a summons to give evidence or to produce documents issued under Section 108 of the Customs Act, 1962. In this regard, he has submitted that essentially, there is a presumption in favour of the constitutionality of an enactment unless it is found that the provision enacted results in palpably arbitrary consequences. Unless it is so shown and demonstrated, the Courts refrain from declaring the law invalid as legislated by the Legislature. In support of this submission, he relied on the decision of the Hon'ble Supreme Court in the case of **R. K. Garg V/s. Union of India, 1981 (4) SCC 675** wherein the Hon'ble Supreme Court has observed that the Court must adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse of any of its provisions come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues.

15. Mr. Raval has further relied on the decision of the Hon'ble Supreme Court in the case of **Bhavesh D. Parish V/s. Union of India and another, 2000 (5) SCC 471** wherein it is held that it is necessary that while dealing with economic legislation, the Court, while not jettisoning its jurisdiction to curb arbitrary action or unconstitutional legislation, would interfere only in those few cases where the view reflected in the legislation is not possible to be taken at all. In view of this settled legal position, Mr. Raval has submitted that Section 108 of the Customs Act does not suffer from any legal or constitutional infirmity much less it can be branded as violative of Article 14 of the Constitution of India. He has, therefore, submitted that the relief as prayed for by the petitioners to declare Section 108 of the Customs Act as violative of Article 14 of the Constitution of India is devoid of any merits.

16. Mr. Raval has further submitted that a bare perusal of the statutory provisions will show that there is no discriminatory treatment by the Section which is impugned in the present petitions. There is no special procedure enacted for a person summoned under the said provision. It relates to persons who have information about offences under the Act. It is not primarily concerned with the persons guilty of offence or it may happen that they may also be summoned. The offences

under the Customs Act are committed secretly often by persons of doubtful respectability and it will not be always easy to find out a violator of law who would always keep behind and be part of organized activity leading to breach/contravention of the provisions of the Act. The offences under the Customs Act are such that interest of the society requires that they should be trapped and brought to book. The dubious ways of which a person committing violation of the provisions of the said Act at his business are not easy of detection. The provision of the kind contained in Section 108 is not restricted to the present enactment. Section 11 (3) of the Industrial Disputes Act contains an almost identical provision. Section 33 (3) of the Insurance Act confers powers of full examination on oath of any Manager, Managing Director or other officers of insurance in relation to their business. Sections 240, 477 and 498 of the Companies Act contain similar provisions. Section 454 (6) and (7) of the Banking Companies Act goes further and provides for record of evidence with due formality and which could be used against the deponent in any civil or criminal proceedings. Article 14 of the Constitution of India specifies for every one the same rules of evidence and modes of proceedings, in other words, the same rule must exist for all in similar circumstances. It is well settled principle that several laws must have universal application for all persons

who are not, by nature, attainment or circumstances, in the same position. There is no hostile discrimination while dealing with the persons who are in possession of information or material which is sought to be questioned under Section 108 and all such persons are treated alike. The discrimination suggested by the petitioners by reason of an alleged protection under a different law i.e. Criminal Procedure Code is unsustainable. The Customs Act, 1962 as per its preamble is an Act to consolidate and amend the law relating to customs. The statement of objects and reasons of the Customs Act stated that the Sea Customs Act, 1878 was a law which lays down basic law relating to customs enacted more than 80 years prior to the present enactment and which was amended from time to time. The last of the important amendments were made in the Sea Customs Act in the year 1955. However, general and comprehensive revision of the Act was not undertaken. The statement of reasons and objectives states that several provisions of the Act had become obsolete and difficulties had also been experienced in the implementation of certain other provisions. There was no separate law relating to Air Customs and the administration of Air Customs was governed by certain rules made in the Indian Aircraft Act, 1911. Mr. Raval has further submitted that only with a view to have the consolidated provisions relating to Sea Customs, Land Customs and Air Customs into

one comprehensive access, the Act was enacted by the Parliament. A perusal of Section 108 provides that a Gazetted Officer of a Customs is duly empowered by the Central Government in that behalf to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making under this Act. Sub-section (2) thereof provides that the summons to produce documents or other things may be for production of certain specified documents or things or for production of all documents or thing of a certain description in possession or under his control. Sub-section (3) thereof provides that all persons so summoned shall be bound to attend either in person or by an authorized agent as such officer may direct and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements or produce such documents and other things as may be required. Sub-section (4) provides that every such inquiry made under Section 108 shall be deemed to be a judicial proceeding within the meaning of Section 193 & 228 of the Indian Penal Code.

17. Mr. Raval further submitted that the Hon'ble Supreme Court in the case of **K. I. Pavunny V/s. Assistant Collector, Central Excise Collectorate, reported in 1997 (3) SCC**

721, held that the object of recording statement is to collect information in relation to the contravention of the provisions of the Act despite there being provisions for further action of confiscation of contraband as well as imposition of penalty under the Act. Mr. Raval has, therefore, submitted that in determining the question of reasonableness, the Court must find some economic, political or other essential interest to be secured and some relation to the classification to the objects sought to be accomplished. The provisions of the Act leave little room for doubt that having regard to difficulties faced in cases of the contravention of provisions of Customs Act, the power to obtain the special testimony or the power to summon any person to give evidence or to produce documents from a person who is in possession of the relevant information, has a direct nexus and a just relation to the object of the enactment to prevent and check evasion of customs law. The objects sought to be achieved are to deal with violator of economic offences. He has, therefore, submitted that as per these provisions, Section 108 of the Customs Act cannot be even remotely alleged to be violative of Article 14 of the Constitution of India. The constitutional guarantee provided under Article 20 (3) cannot be made a ground to urge that section 108 is violative of the said provision on almost the same submissions which are urged by him.

18. Mr. Raval has further submitted that the petitioners have invoked the discretionary, extraordinary and highly prerogative writ jurisdiction of this Court under Article 226 of the Constitution of India. The petitioners of their very conduct have disentitled themselves to the invocation of such jurisdiction and the grant of any discretionary relief. Mr. Raval has invited the Court's attention to the sequence of events that have taken place throwing light on the role played by the petitioners. Firstly summons were issued to the petitioners to appear before the DRI Officer and they were called upon to give their depositions and also to produce documents relating to inquiry in their possession. However, the petitioners have chosen not to respond to the said summons by remaining present and give their depositions. Thereafter, repeatedly summons were issued and the petitioners have avoided appearing before DRI Officer. The petitioners have repeatedly replied that they had submitted all documents relating to the transactions with M/s. Krishna Trading Company, M/s. Meenu Exim Private Limited, M/s. Nirmal Polyester Private Limited and M/s. Pradeepkumar Nirmalkumar, all having their factories at Pipodara, Surat (Tarachand group of companies) against whom the investigations are carried out by DRI, Zonal Unit, Ahmedabad. The department through various

correspondences intimated the petitioners that evidence of the petitioners is required to be recorded at Ahmedabad only on the basis of documents available on record and it is not possible to take the records and other crucial evidences out from the office of the Directorate which are likely to hamper the entire investigation initiated by the department.

19. Mr. Raval has further submitted that since the petitioners having failed to respond to the summons, there was no option left with the authorities but to lodge a prosecution against the petitioners for having committed offences punishable under Sections 174 & 175 of the IPC. On the complaint being filed in the Court of learned Metropolitan Magistrate, Ahmedabad on 22.12.2006, by an order dated 05.01.2007, summons was ordered to be issued upon the accused directing it to be served through Regd. A.D. as well as through Police returnable on 25th January, 2007. The perusal of the order rendered below Exh.6 dated 23rd April, 2007 would go to show that even on that date it was the 5th adjournment taken after appearance of the advocate and neither the petitioners nor their learned advocates were present. The order records that despite directions having been issued on the adjournment application by the Court, the petitioners have not obeyed the same and, therefore, the Court had reasonable belief that there was an attempt by the petitioners to avoid

the proceedings in Court and on account of their absence, the proceedings could not be conducted further. It was under these circumstances that a warrant was ordered to be issued by an order dated 23.04.2007. Subsequent to the said order having been passed, on 14.05.2007 an application was given at Exh. 7 where also an assurance was given for remaining present despite which till this date, the petitioners have chosen not to remain present and it was under those circumstances the Court was constrained to pass the order rejecting the said application. He has further submitted that the petitioners thereafter filed Criminal Misc. Application No.1835 of 2007 in the court of City Sessions Judge at Ahmedabad under Section 438 of Cr.P.C., praying for grant of anticipatory bail and the learned Additional Sessions Judge, Court No.6, Ahmedabad vide his order dated 24.05.2007 has allowed the said application by directing that in the event of arrest of the petitioner, Shri Rajnishkumar Tuli in connection with Criminal Case No. 2 of 2007, he would be released on bail on furnishing personal bond of Rs.25,000/-, however, subject to the following conditions :-

(a) That the petitioner (applicant before the Court) shall surrender himself before the Additional Chief Metropolitan Magistrate for executing bond and furnishing security on 11th June, 2007 failing which the

order would stand cancelled.

(b) That the applicant, if arrested in pursuance of the order and released on bail, the order of bail would remain operative only for a period of 10 days from the arrest during which period he will be required to make a fresh application for being enlarged on bail.

20. The petitioner having been granted discretionary order of anticipatory bail so as to prevent his arrest, thereafter despite having accepted the order subject to the conditions mentioned therein, turned around and filed Cri. Misc. Application No. 6315 of 2007 before this Court challenging the conditions of the said bail order. In the said petition, what was prayed was to quash and set aside conditions No. 1 to 3 including the condition imposed to remain present. This petition came up for hearing on 11.06.2007. Advance copy was served on 11.06.2007 on the learned Standing Counsel just prior to the matter being circulated on the very same date at 2.15 p.m. On matter being assigned to learned Central Government Standing Counsel, the appearance was recorded and the Learned Single Judge in exercise of jurisdiction as a coordinate Court under Section 438 read with Section 482 has, after hearing the petitioner and having taken into consideration the facts and circumstances of the case, held that the said condition imposed by the learned

Judge is an exercise of discretionary power and no grounds are made out for rescinding the said condition. The Learned Single Judge has further recorded that when the petitioner is facing criminal prosecution and for want of appearance before the Court, non-bailable warrant was issued, no illegality seems to have been committed by the learned Additional Sessions Judge in imposing the said conditions for grant of anticipatory bail. The Learned Single Judge has, therefore, directed the petitioner to remain present before the learned Magistrate as required in condition No. 1 on or before 30.06.2007.

21. In view of these facts, Mr. Raval has submitted that the Learned Single Judge exercising jurisdiction as coordinate Court having taken the view, it is now impermissible in law for the petitioners to seek the same relief in a different form and under the circumstances, the present petitions are nothing else but repeated attempts on the part of the petitioners to avoid appearance, firstly by avoiding response to summons and appear before the Officers and thereafter before the Court though promised and assured.

22. Mr. Raval has further submitted that the petitioners have made another attempt to avoid appearance before the Court by filing an application in Cri. Misc. Application No. 6315 of 2007 seeking extension of time to remain present before the

Metropolitan Magistrate in compliance of the order passed by the learned City Sessions Court dated 24.05.2007 and as modified by this Court. The petitioner has also made an application on 29.06.2007 praying for exemption from personally appearing on 30.06.2007 on the ground that the petitioner was still not in a position to remain present before the learned Metropolitan Magistrate on 30.06.2007.

23. Even the petitioner of Special Criminal Application No. 1041 of 2007 i.e. Mr. Ruchit R. Tuli, upon his arrest was produced before the Chief Judicial Magistrate, Ludhiana, who in his order granted transit bail, looking to the facts and circumstances of the case, with a direction to appear before the Additional Chief Metropolitan Magistrate at Ahmedabad on 01.06.2007, upon furnishing a personal Bond of Rs.25,000/- with one surety in the like amount. Instead of appearing, he filed an application for regular bail under Section 437 of the Code on 29.05.2007 before the learned Metropolitan Magistrate at Ahmedabad. He has, thereafter, filed present petition before this Court. Though there is no order in his favour, he has not appeared till this date on the ground of his alleged ill-health.

24. Mr. Raval has further submitted that the entire attempt of the petitioners by way of filing the present petitions is to scuttle

the investigation. The petitioners are lacking any bona fides and hence, any interference by this Court would impede the course of inquiry or investigation, which is still pending. He has further submitted that the investigating agency has not transgressed any provision of law. He relied on the decision of the Hon'ble Supreme Court in the case of **Dukhishyam Benupani, Asst. Director, Enforcement Directorate (FERA) V/s. Arun Kumar Bajoria reported in 1998 SCC (Criminal) 261** wherein it is held that it must be left to the investigating agency to decide the venue, the timings and the questions and the manner of putting such questions to the persons involved in such offences. He has, therefore, submitted that no indulgence should be shown by this Court in the present petitions. He has, therefore, submitted that both these petitions deserve to be dismissed.

25. After having heard learned advocates appearing for the respective parties and after having gone through the memo of petitions, affidavit-in-reply, rejoinder affidavit as well as documents attached therewith, we are of the view that there is no substance or merits in the arguments canvassed on behalf of the petitioners. We could have summarily dismissed these petitions without entering into such elaborate discussion. It is only because of the fact that constitutional validity of Section 108 of the Customs Act is sought to be

challenged by the petitioners, several aspects of the issue are taken into consideration. As far as vires of Section 108 of the Customs Act is concerned, the main argument of Mr. Raju is that though there is specific provision under Section 160 (1) of the Code of Criminal Procedure 1973, with regard to recording of statements of the witnesses by the Police Officers of the adjoining police station and also there is specific provision to provide expenses if such statements are recorded at the Police Station which is far away from the residence of the deponent no such provisions are made under Section 108 of the Act. To deal with this argument, it is to be seen that there is always a presumption in favour of the constitutionality of a statute and the burden is upon the person who attacks it to show that there has been a clear transgression of the constitutional principles. This burden cannot be discharged by pointing out a provision contained in Section 160 of the Criminal Procedure Code. As a matter of fact, similar provisions are found in Section 11 (3) of the Industrial Disputes Act, Section 33 (3) of Insurance Act, Sections 27, 474 and 498 of the Companies Act and Sections 454 (6) and (7) of the Banking Companies Act. All these sections provide for recording of evidence with due formality and these provisions are used against the deponent in any civil or criminal proceedings. It is further to be seen that petitioners have challenged the constitutional validity of

Section 108 on the touchstone of Article 14 & 20 (3) of the Constitution of India. However, there is no violation of any of these constitutional provisions. There is no discrimination at all. All are treated in a like manner and there is no hostile discrimination while dealing with the persons whose statements are to be recorded under Section 108 of the Act. There is no dispute about the fact that the object of recording the statement under Section 108 of the Act is to collect information in relation to the contravention of the provisions of the Act. These proceedings are judicial proceedings and the inquiry contemplated therein is only for the purpose of preventing the contravention or detection of offences and the legislative intention behind it is to safeguard the revenue and reimburse the Government which are not essentially powers of a criminal prosecution. It is also to be seen that it is not a solitary case of the petitioners that they have been summoned to Ahmedabad to give their evidence. Many of the High Seas sellers from Mumbai who had sold the imported goods to Tarachand Group of Companies were summoned to Ahmedabad to give their evidence and their confessional statements were recorded under Section 108 of the Customs Act. It is also relevant consideration to decide the issue that there is serious allegation against the petitioners to the effect that they are consciously involved in the diversion of the duty free raw material of Tarachand Group of Companies. It is,

therefore, not feasible for a Gazetted Officer to carry all the records to each and every place to record the evidences of various persons involved in the investigation. It is also clear from the very nature of proceedings that the Custom Officers are not Police Officers and only for limited purposes in relation to the Criminal Procedure Code, provisions had been made in some cases for the Custom Officers to act as Police Officers. Summons under Section 108 of the Act have been issued to record the evidence of the petitioners and to produce documents relating to the inquiry being conducted by the department and hence, it may not be possible to state what would be the questions to be put forth to the petitioners and what are the evidences available with the department. The challenge to the provision of Section 108 on the ground that the same being violative of Article 20 (3) of the Constitution of India is also devoid of any merits.

26. The Hon'ble Supreme Court has considered this aspect in the case of **Veera Ibrahim V/s. The State of Maharashtra, AIR 1976 SC 1167** and observed that when the statement of a person was recorded by the Customs Officer under Section 108, that person was not a person “accused of any offence” under the Customs Act. An accusation which would stamp him with the character of such a person was levelled only when the complaint was filed against him, by the Assistant

Collector of Customs complaining of the commission of offences under Section 135 (a) and Section 135 (b) of the Customs Act. It is, therefore, clear that when the Summons is issued under Section 108, he is merely called upon to give his evidence for departmental proceedings and, therefore, there is no question of it being in violation of Article 20 (3) of the Constitution of India. Similarly, provisions of Section 108 of the Customs Act have also come up for consideration before the Hon'ble Supreme Court in the case of **Assistant Collector of Central Excise, Rajamundry V/s. Duncan Agro Industries Ltd. And others, AIR 2000 SC 2901** wherein it is held that Section 108 of the Customs Act does not contemplate any magisterial intervention. The power under the said Section is intended to be exercised by a Gazetted Officer of the Customs department. Sub-section (3) enjoins on the person summoned by the Officer to state the truth upon any subject respecting which he is examined. He is not excused from speaking the truth on the premise that such statement could be used against him. The said requirement is included in the provision for the purpose of enabling the Gazetted Officer to elicit the truth from the persons interrogated. Therefore, the challenge on the ground of violation of Article 20 (3) is equally untenable. Support can also be derived from the decision of the Hon'ble Supreme Court in the case of **Percy Rustomji Basta, V/s. The State**

of Maharashtra, AIR 1971 SC 1087 wherein it is held that a person summoned under Section 108 of the Customs Act is bound to appear and state the truth when giving evidence. The fact that the petitioners have chosen not to appear itself is indicative of the intention of the petitioners to evade participating in the investigation process. It cannot be expected that the department should adopt a system or practice of going to different places for the purposes of recording the statements of the persons under Section 108 of the Act during the course of investigation. For all these reasons, we are of the view that the provisions contained in Section 108 of the Customs Act are in accordance with the constitutional principles and they are not violative of either Article 14 or 20 (3) of the Constitution of India.

27. Mr. Raju has also addressed the Court on the ground that the learned Metropolitan Magistrate has issued process in contravention of the provisions contained in Section 202 of the Criminal Procedure Code as amended in 2005. It is obligatory on the part of the Magistrate to postpone the issue of process where the accused is residing at a place beyond the area in which he exercises his jurisdiction.

28. There is no dispute about the fact that the petitioners are not residing within the jurisdiction of the learned Metropolitan

Magistrate and in normal circumstances, before issuance of the process, he has to make an inquiry into the matter. However, the material facts cannot be lost sight of that the criminal cases are filed for offences punishable under Sections 174 & 175 of the IPC. They are for non-appearance and/or non-production of documents in pursuance of summons issued by the Customs Officer under Section 108 of the Customs Act. The complaint gives detailed factual background about the issuance of different Summons which have not been complied with by the petitioners. The order gives an indication that before issuance of process, the Magistrate had read the complaint and the averments made therein and the complaint clearly reveals that despite issuance of summons, the petitioners did not remain present. Hence, no further inquiry was required to be made as contemplated under Section 202 of the Code. Moreover, while making the amendment in Section 202 by Criminal Procedure (Amendment) Act, 2005, it is clearly stated in notes and clauses that Sub-section (1) has been amended to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction, he shall inquire into the case himself or direct investigation to be made by a Police Officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused. It is further stated that

this has been done to see that innocent persons are not harassed by the unscrupulous persons. If the objects as revealed in notes and clauses are taken into consideration, it is clear that all these criteria have been fulfilled in the present case. There are specific averments in the complaint which show that there was sufficient ground to proceed against the petitioners. Summons were issued by the Customs Officer against the petitioners. The complainant is not a private party but a Customs Officer who cannot be considered as an unscrupulous person. The complaint by itself and without any further investigation does disclose a prima facie case against the petitioners. We are, therefore, of the view that there is no violation of the provisions contained in Section 202 of the Criminal Procedure Code. Since petitioners have not appeared even after service of process and even after assurance given to the Court, non-bailable warrant was rightly issued by the learned Metropolitan Magistrate.

29. As far as issue of non-bailable warrant and Mr. Raju's reliance on the decision of this Court in the case of **Dipak Navnitlal Parikh** (supra) and Delhi High Court in **G. Sagar Suri** (supra) is concerned, we are of the view that the facts are totally different in the present case. The learned Metropolitan Magistrate has not straightaway issued the

arrest warrant. Initially, the process was issued. Thereafter, on four to five occasions, despite an assurance being given to the Court, the petitioners did not remain present. On the date of issuance of arrest warrant, neither the petitioners nor their advocate remained present and hence, the learned Metropolitan Magistrate was justified in issuing the arrest warrant and that too, after recording reasons.

30. No case is made out by the petitioners so as to show any indulgence in the matter. Facts and circumstances of the case do not justify to exercise our extraordinary and prerogative writ jurisdiction and to grant discretionary relief under Articles 226 and/or 227 of the Constitution of India. Both these petitions are, therefore, dismissed.

[M. S. SHAH, J.]

[K. A. PUJ, J.]

Savariya